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Putting Political Constitutionalism in its Place

Abstract

The question of the legitimacy of judicial review of legislative and to a lesser extent, administrative, action is a perennial theme in constitutional studies. However recent years have seen particular attention to this question in political theory, notably in the work of Jeremy Waldron and Richard Bellamy, who have provided robust normative defences of legislative supremacy in questions of constitutional design. Both of their approaches, however, through their insistence on 'disagreement all the way down', have come up against the challenge that their positions are ultimately self-defeating. This paper attempts to take up this challenge to theories of political constitutionalism by adding an additional layer of moral arguments to defend legislative supremacy through a minimal theory of legitimacy. As it relies on providing moral reasons for resisting a move from political to legal constitutionalism only in those jurisdictions where it is actually currently practiced, as opposed to a more general argument as to why political constitutionalism is the most legitimate form of constitutional design in constitutional democracies, it is therefore only a partial defence of political constitutionalism. However, given that the defences of political constitutionalism are self-defeating on their own terms, the paper concludes that the conditions of this partial defence are a necessary prior to theoretical defenses of legislative supremacy.

1. Introduction

The past number of decades have seen an inexorable rise in the number of jurisdictions practicing judicial review of legislative and administrative measures, particularly for compatibility with fundamental rights standards.¹ This 'judicialization of politics'² can be attributed to two main features of the postwar era; the rise of supranational rights adjudication, particularly in Europe, as well as the spread of liberal ideals in the aftermath of the end of the cold war.³ These developments have also affected jurisdictions such as those which traditionally followed the Westminster parliamentary model based on the doctrine of

¹ See generally, B. Ackerman, 'The Rise of World Constitutionalism' (1997) 83 Va. L. Rev. 771; T. Ginsburg, 'The Global Spread of Constitutional Review' in K. Whittington, R. Kelemen and G. Caldeira (eds.), *The Oxford Handbook of Law and Politics*, (OUP, 2008).

² S. Shapiro and A. Stone Sweet, *On Law, Politics and Judicialization*, (OUP 2002).

³ See L. Heffler & A.-M. Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107(2) YLJ 273-392; A. Stone Sweet and H. Keller, *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, (OUP 2008); W. Sadurski, *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, (Springer, 2005).

parliamentary supremacy or the Nordic model of judicial review.⁴ Even the blueprint for the Westminster model of government, the U. K., has not escaped these developments.⁵

This increased judicialization of politics has coincided with a lively debate in political and constitutional theory surrounding the legitimacy of the practice in constitutional democracies, framed in terms of the opposition between legal and political constitutionalism.⁶ Whereas the fields of political and legal constitutionalism entail issues beyond the admittedly somewhat stylized dichotomy of the ultimate decision-making powers of legislative assemblies or courts,⁷ it is within this dichotomy that these ideas receive their most common expression.⁸ As such, the most popular front of contestation between political and legal constitutionalism has been with regard to the question of whether courts or legislatures should have ultimate decision-making authority on the identification, interpretation and application of the fundamental values, usually expressed as fundamental rights, of a particular legal order or constitutional settlement.⁹ Given the fact that this question is primarily institutional, then, this question can be framed in terms of the opposition between *institutional* political constitutionalism and *institutional* legal constitutionalism.¹⁰

This paper will focus on the theoretical defence of institutional political constitutionalism from two prominent theorists in the field, Jeremy Waldron and Richard Bellamy who have developed

⁴ See generally S. Gardbaum, *The New Commonwealth Model of Constitutionalism* (CUP, 2013); 'Symposium: Nordic Juristocracy' (2011) 9(2) *Int J Constitutional Law* 449-547.

⁵ See generally, A. Kavanagh, *Constitutional Review under the UK Human Rights Act* (CUP, 2009).

⁶ The debate in the Anglophone world has been dominated by the UK context see, for example, J. A. G. Griffith, 'The Political Constitution' (1979) 42(1) *Modern Law Review* 1-21; G. Gee and G. Webber, 'What Is a Political Constitution?' (2010) 30(2) *Oxford Journal of Legal Studies*, 273-299. However US scholars have also dealt with the issue, see M. Tushnet, *Taking the Constitution Away from the Courts*, (PUP, 2000), L. D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review*, (OUP, 2004). For a recent discussion of general themes both within and beyond the UK context see the special issue M. Goldoni & C. MacCorkindale (eds.) 'Political Constitutions' (2013) 14 *German Law Journal* available at: www.germanlawjournal.com/index.php?pageID=11&artID=1595

⁷ See for example S. Tierney, 'Whose Political Constitution?: Citizens and Referendums' in Goldoni & MacCorkindale (2013).

⁸ See Gee and Webber, (2010).

⁹ J. Waldron, 'A Right-Based Critique of Constitutional Rights' (1993) 13(1) *Oxford Journal of Legal Studies* 18-51.

¹⁰ The terms 'Institutional Political Constitutionalism' will be used interchangeably with 'legislative supremacy' throughout this paper as will 'institutional legal constitutionalism' and 'judicial supremacy'.

sophisticated defences of legislative supremacy from the viewpoints of liberalism and republicanism respectively.¹¹ More specifically, it will focus on a powerful critique of these positions which argues that they are incoherent or self-defeating due to their insistence on disagreement 'all the way down'.¹² In the light of the shift to judicial supremacy in recent times, the paper argues, this challenge is of particular practical and political import. The paper therefore attempts to salvage a theoretical defence of institutional political constitutionalism by overcoming its self-defeating nature through the addition of a minimal theory of legitimacy to Waldron and Bellamy's accounts. This has the result of creating a strong moral presumption in favour of political constitutionalism where practiced. This presumption, combined with Waldron and Bellamy's defences of legislative supremacy, combine to defeat arguments for a switch to institutional legal constitutionalism, particularly on fundamental rights grounds. As it only provides reasons for the preservation of actually existing practices of institutional political constitutionalism, rather than a more general account of the *per se* superior legitimacy of political constitutionalism, it is therefore only a *partial* defence, incorporating an important contingent fact of the state of constitutional practice in particular jurisdictions. Nonetheless, in the light of the self-defeating nature of stand-alone defences of institutional political constitutionalism, the paper argues, this is as good as it gets for institutional political constitutionalism and the minimal theory of legitimacy constitutes a necessary prior condition for a successful theoretical defense of the legitimacy of legislative supremacy.

¹¹ See generally Waldron (1993), J. Waldron, *Law and Disagreement*, (OUP 1999) (hereinafter *LD*), J. Waldron, 'The Core of The Case Against Judicial Review' (2005) 115 *Yale Law Journal*, 1346, (hereinafter 'Core Case'), R. Bellamy, 'The Political Form of the Constitution: the Separation of Powers, Rights and Representative Democracy' (1996) XLIV *Political Studies* 436-456, R. Bellamy, *Political Constitutionalism*, (CUP 2007) (hereinafter *PC*), Richard Bellamy, 'Political Constitutionalism and the Human Rights Act' (2011) 9 *International Journal of Constitutional Law* 86

¹² See generally T. Christiano, 'Waldron on Law and Disagreement' (2000) 19 *Law and Philosophy* 513-543. Different versions of the critique can be found in J. Raz, 'Disagreement in Politics' (1998) 43 *Am. J. Juris.* 25, , C. Fabre, 'The Dignity of Rights' (2000) 20(2) *O.J.L.S.* 271-282, C. L. Eisgruber, 'Democracy and Disagreement: A Common on Jeremy Waldron's Law and Disagreement' (2002) 6 N.Y.U. J. Legis. & Pub. Pol'y 65, A. Kavanagh. 'Participation and Judicial Review: A Reply to Jeremy Waldron' (2003) 22 *Law and Philosophy* 451-486. Whereas all of these pieces deal specifically to Waldron's defence, they apply, with minor modifications also to Bellamy's republican defence. See Part 3.

The paper proceeds as follows. Part 2 provides a brief summary of the general contours of Waldron and Bellamy's well-known defences of legislative supremacy. Part 3 explains the challenge to their defences of institutional political constitutionalism on the grounds that they are ultimately self-defeating. Part 4 identifies the primary problem with these accounts as failures as theories of authority and Part 5 provides an outline of a theory of authority, the minimal theory of legitimacy which compensates for the gaps in Waldron and Bellamy's defences *qua* theories of authority.

2. Waldron and Bellamy on Disagreement

In defending the practice of institutional political constitutionalism, both Waldron and Bellamy depart from the 'circumstances of politics', that is the 'felt need among the members of a certain group for a common framework or decision or course of action on some matter, even in the face of disagreement about what that framework, decision or action should be.'¹³ In the circumstances of politics, not only do we disagree about the meaning of the good, but we also disagree about the right, and the origins, nature and meaning of fundamental rights as well as the values which they purport to protect, yet we still require collective action on these matters. As such, and notwithstanding such disagreement, some decision-making authority is necessary which acts by resolving the disagreement about the right and the good without replicating it. However, for both Waldron and Bellamy we also need a decision-making procedure which is worthy of the respect of those over whom decisions are made; that is a decision-making authority which is legitimate. For both Waldron and Bellamy, the most legitimate form of decision-making authority, is one which makes decisions according to a procedure which is respectful of all citizens involved in disagreement by treating them equally,¹⁴ that is where they are 'regarded as equals and their multifarious rights and interests accorded equal respect and concern.'¹⁵ Whereas they draw on different political theories in order to give content to their understandings of the equality and liberty of individuals in the

¹³ *LD*, 102. *PC* 5.

¹⁴ *LD*, 109.

¹⁵ *PC*, 5.

circumstances of politics – Waldron drawing on liberal political equality, Bellamy on republican freedom – they both conclude that in questions of institutional design, and particularly the choice between judicial or legislative supremacy with regard to decision-making in the circumstances of politics, that the latter form best respects their premises of equality in the face of disagreement, and is therefore the most legitimate form of institutional design.¹⁶

More specifically, Waldron identifies two types of reasons for determining the legitimacy of decision-making by courts and legislatures; consequentialist ‘out-come related reasons’ and deontological ‘processed-related reasons’.¹⁷ He examines the reasons for and against courts and legislatures based on both of these types of reasons, concluding that the case for either judicial or legislative supremacy based on outcome-related reasons is inconclusive (or argues in favour of legislatures), due to the fact that empirically courts have proven no better than legislatures in preventing rights violations and that the outcomes-based reasons for favouring courts, such as reason-giving, focus on particular cases etc. apply as much to legislatures or don’t apply to either.¹⁸ Process-based reasons, however, Waldron argues, weigh wholly in favour of institutional political constitutionalism.¹⁹ This latter position forms the basis of the ‘core’²⁰ of the case in favour of institutional political constitutionalism. The process based reasons for institutional political constitutionalism as a more legitimate form of constitutional design is predicated, as noted above, on the notion of political equality, and particularly the equality of citizen’s influence in decision-making. The optimal way to secure this, for Waldron, is through ‘fair elections to the legislature where [citizens] are treated equally along with their fellow citizens.’²¹ Furthermore, majority decision-making within the representative legislature allows for decisions to be made while treating participants equally, giving ‘each expressed opinion the greatest weight possible compatible with giving equal weight to

¹⁶ *PC* Ch. 1; Waldron, ‘Core Case’, above.

¹⁷ ‘Core Case’, 1372-3.

¹⁸ ‘Core Case’, 1376-1386.

¹⁹ ‘Core Case’, p. 1393.

²⁰ ‘Core Case’, 1346.

²¹ ‘Core Case’, 1387.

all opinions.²² Waldron illustrates this idea by reference to a hypothetical citizen Cn. For Waldron the legitimacy of decision-making turns on giving reasons to this hypothetical citizen, 'who is to be bound or burdened'²³ by a decision with which she disagrees as to why she should 'accept, comply or put up with it.'²⁴ More specifically, legitimacy, for Waldron, involves furnishing adequate responses to two potential questions which Cn could raise about the decision-making process; how are the decision-makers legitimate and why didn't Cn's opinion on the matter carry greater weight in the decision-making process.²⁵ This test, according to Waldron, constitutes, '*the*' theory of political legitimacy.²⁶ For Waldron, legislative supremacy provides a much more convincing account than judicial supremacy as to why Cn should accept the decision due to the fact that majority decision in a legislature – unlike in Courts - 'treats participants equally, and gives each expressed opinion the greatest weight possible compatible with giving equal weight to all opinions.'²⁷

In a manner very similar to Waldron, Bellamy adopts two criteria of the legitimacy of decision-making which overlap squarely with Waldron's two questions raised in relation to the hypothetical citizen Cn; that a citizen must feel that there is no difference in status between them and the decision-makers and that the reason that more weight wasn't given to a particular citizen's opinion cannot be based on the contention that the 'winners' held an objectively 'correct' view on some matter.²⁸ For Bellamy, these criteria are best satisfied according a 'standard democratic process' of decision-making.²⁹ It is only in this way that citizens are able to step back from the decision itself and see the legitimacy of the process of decision-making as securing the 'equal concern and respect'³⁰ of fellow citizens. However the 'distinctiveness'³¹ of decision-making according to institutional political, rather than legal, constitutionalism, for Bellamy lies in its 'non-

²² 'Core Case', 1388.

²³ 'Core case', p. 1387.

²⁴ 'Core case', p. 1387

²⁵ 'Core case', 1387.

²⁶ 'Core case', 1387.

²⁷ 'Core case', 1388.

²⁸ *PC*, 164-5.

²⁹ *PC*, 164-5.

³⁰ *PC*, 165.

³¹ *PC*, 165.

dominating character³² as an account inspired by republican freedom rather than political liberalism.³³ Courts cannot enjoy such legitimacy as judges implicitly claim a status superior to individual citizens in decision-making in institutional legal constitutionalism and have no incentives to adopt the viewpoint of individual citizens.³⁴ Given their implicitly claimed superior status, as well as the fact that in decision-making they can give their own opinions more weight than that of individual citizens on the mere grounds that they are in a position to ‘impose their opinion’³⁵, the rule of judges ‘cannot be other than arbitrary and hence dominating.’³⁶

In terms of the types of reasons which militate in favour of legislative over judicial supremacy, Bellamy, like Waldron, argues for the priority of process-based reasons over outcomes-based reasons. However, Bellamy argues against severing process and outcomes based reasons when considering the legitimacy of procedures given that even if we agreed on outcomes – which in the circumstances of politics we do not – procedural questions would still need to be addressed in order to secure those particular outcomes.³⁷ As such, we cannot be wholly agnostic about procedures, even with a focus on outcomes, given that the design of the procedures will necessarily affect the desired outcomes.³⁸ Furthermore, in some cases, the actual outcomes may, in practice, diverge from those envisaged and as such procedure needs to carry some ‘independent normative weight’,³⁹ even on an outcomes-based focus.⁴⁰ As such, then, outcomes-based reasons can be subsumed into process-based ones. The upshot of this is that when looking at the legitimacy of decision-making in the circumstances of politics, procedure is where the real action is. In this light, then, legislatures are more legitimate than courts for both procedural and outcomes-based reasons, from the viewpoint of a republican interpretation of treating citizens with ‘equal respect and concern’.

³² *PC*, 165.

³³ *PC*, Chapter 4.

³⁴ *PC*, 166.

³⁵ *PC*, 166.

³⁶ *PC*, 167.

³⁷ *PC*, 172.

³⁸ *PC*, 171.

³⁹ *PC*, 172.

⁴⁰ *PC*, 172.

3. Disagreeing about disagreement

The root of the problem with these defences of institutional political constitutionalism lies in the issue of disagreement about *procedures* in the circumstances of politics. As will be recalled, the circumstances of politics relates to a consensus among citizens that collective decision-making is necessary notwithstanding disagreement among those citizens about the substantive content of collective decisions involving both the right and the good. However, as well as disagreeing about the right and the good, the ‘framework’⁴¹ for decisions will ‘also be the subject of political debate’⁴², a fact which both Waldron and Bellamy explicitly envisage in their accounts of the circumstances of politics.⁴³ In terms of the terrain of the debate between institutional political and legal constitutionalism, then, as well as expecting disagreement about both the right and the good, we must also expect reasonable disagreement about the fairest or most legitimate way to proceed in the circumstances of politics; that is, that we must expect disagreement to emerge about whether in fact legislative supremacy is the most legitimate response to the circumstances of politics.

This type of disagreement can be illustrated by co-opting Waldron’s hypothetical citizen discussed above, Cn, and imagining a scenario whereby a court has struck down a piece of legislation excluding, for example, certain individuals such as prisoners from the right to vote. In this scenario, Cn’s representative voted in favour of the impugned legislation and it is a law with which she agrees. In taking up Waldron’s gambit regarding his own definition of legitimacy, we need to furnish her with reasons as to why the Court’s decisions striking down the law is legitimate from the viewpoint of political equality, and particularly her equal standing with her fellow citizens – that is why the decision-makers are legitimate and why her opinion wasn’t given more weight in the decision. What a defender of the Court’s decision could say is that while it is true that the law struck down was one which was approved by Cn’s representative in

⁴¹ LD, 102.

⁴² PC, 5.

⁴³ *Ibid* and LD, 102.

the legislature and one with which she personally agreed, in order to ensure that the weight of opinion of those potentially excluded by the law was given equal status with her own, a body external to the legislature was necessary to scrutinize its activities to ensure that it remains legitimate such that the access and participation of citizens like herself on equal terms, is secured.⁴⁴ Whereas Cn was the 'loser' of this particular decision, in upholding the equality of access to the legislature through, for example the right to vote, in the future she too may benefit from this decision, so if she looks at it in the broader scheme of things, as a voter whose equality was upheld in this decision, she, as a citizen, is fact a 'winner'. Now, Cn doesn't have to accept these particular reasons but she doesn't objectively have any less reason to discount them than she does to accept Waldron's reasons for the superior legitimacy of legislative supremacy when a particular decision hasn't gone her way, if she believes in political equality. Both positions claim to be securing the equality and voice of Cn, albeit in different ways and through different means.⁴⁵ It will ultimately depend on whether Cn is persuaded more by either argument. Extrapolating further this basis for disagreement about the legitimacy of procedures, even if Cn does not believe that political equality is best respected by courts in the manner outlined above, in the circumstances of politics we would be likely to find citizens who do believe that respecting political equality or republican freedom requires judicial intervention.⁴⁶ Given their acceptance of citizens' 'burdens of judgment',⁴⁷ it is not available to Bellamy or Waldron to claim that such individuals are being deliberately obtuse in believing that judicial intervention is necessary to protect political equality or republican freedom.⁴⁸

In the light of disagreement about procedures in the circumstances of politics, then, a further procedure will be necessary to resolve *that* particular disagreement before being able to use that

⁴⁴ For an example of this kind of argument, see R. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*, (OUP, 1996), p. 32.

⁴⁵ We can expect a similar disagreement to emerge *mutatis mutandis* with respect to republican liberty where the meaning of 'domination' will very much be in the eye of the beholder. See for example, C. Beitz, *Political equality*, (1989), 64.

⁴⁶ Such as citizens who take a Dworkinian view of the question. See Dworkin (1996).

⁴⁷ J. Rawls, *Political Liberalism*, (Columbia University Press, 1993), whereby 'many of our most important judgments are made under conditions where it is not to be expected that conscientious persons with full powers of reason, even after free discussion, will arrive at the same conclusion.', 58.

⁴⁸ See 'Core Case', 1346 and PC, 23.

procedure to resolve disagreement about the right and the good. That is, as well as a procedure to make decisions in the face of disagreement about the right and the good, we will also need a second, further, procedure to resolve disagreement about the institutional mechanisms by which such first order disagreement should be resolved, in this case by legislatures or courts. This procedure must also satisfy the requirements of legitimacy. Therefore, in a second order decision-making procedure to resolve disagreement on the question of institutional design, we should expect again, reasonable good-faith disagreement as to which procedure should be used to make this decision. Various opinions and views will emerge in a pluralist society envisaged by the circumstances of politics as to the most legitimate way of settling this second order disagreement such as whether the procedure should involve an open participative forum operating by majority rule such as a constitutional convention, or should involve bureaucrats and elites behind closed-doors for reasons of efficiency or expertise, or whether certain people should be excluded from this particular decision-making process, or whether the results of the process should be ratified by referendum, or whether courts should be charged with setting the parameters of this decision-making process in terms of validity, values and so on. Faced with *this* disagreement, a further, third order, procedure would be necessary to make decisions on these question. However, this third level of decision-making would also be bedeviled by disagreement about the optimal way to decide requiring, in turn, a further fourth level procedure to resolve disagreement at the third level and so on leading to an infinite regress of procedures.⁴⁹

Both Waldron and Bellamy are aware of the problem that disagreement about procedures presents for their defences of legislative supremacy. However, their response to this problem proves to be self-defeating, undermining the theoretical case for legislative supremacy.

⁴⁹ For discussion, see Christiano (2000), 521.

Waldron, for example, argues somewhat tersely that even if we disagree about procedures we have no choice but to consider them.⁵⁰ He argues that there are important reasons relating to legitimacy such as ‘fairness, voice [and] participation’⁵¹ which do not arise other than when considering procedures. He attempts to stop the infinite regress at the second level by advocating majority rule to make decisions in the face of disagreement about questions of institutional design. He claims that using a particular procedure to resolve disagreement about procedures at this level is not to ‘privilege’⁵² the procedure but ‘simply to use it’.⁵³ At this second level, Waldron claims that we are left in a ‘legitimacy free zone in which the best that we can hope for is that a legitimate democratic system emerges somehow or other.’⁵⁴ As such, he calls for ‘pragmatism’ in considering disagreement at this level ‘because we need a procedure on this occasion and this is the one we are stuck with for the time being.’⁵⁵ However, such an approach does not, for Waldron, lead to a results or outcome oriented approach because ‘pragmatism is not necessarily the same as orientation to results.’⁵⁶ The pragmatic solution to disagreement at this level is still a normatively infused procedural one. In any case, Waldron argues, the resolution of disagreement at this level by reference to a judicial procedure is no more legitimate than his solution of majority decision in a democratic assembly.⁵⁷

This final point is true as far as it goes but it constitutes an unsatisfactory *tu quoque*. Claiming that an alternative potentially flawed procedure is no better than a proposed flawed procedure does not make the case for that procedure. Furthermore, as has been well documented, Waldron’s more general response to this challenge of infinite regress is highly unsatisfactory.⁵⁸ First of all, Waldron’s claim that such disagreement brings us to a ‘legitimacy free zone’ is unsustainable. As Kavanagh notes, ‘[i]f we

⁵⁰ ‘Core Case’, 1346.

⁵¹ ‘Core Case’, 1372.

⁵² *LD*, 301.

⁵³ *LD*, 301.

⁵⁴ *LD*, 300.

⁵⁵ *LD*, 301.

⁵⁶ *LD*, 300.

⁵⁷ *LD*, 302.

⁵⁸ See Christiano (2000) Fabre (2000), Eisgruber (2002), Kavanagh (2003) above.

use a procedure for political decision-making without knowing whether it is legitimate or not, then we have no reason to accept the outcome of such a procedure as authoritative.⁵⁹ Secondly, Waldron's claim that there is no privileging of democratic majority rule in resolving this procedure is to claim a spurious neutrality for his own viewpoint. We disagree about what precisely 'fairness, voice [and] participation' means. As such, majority rule is far from 'neutral' among conceptions of these ideals, but is rather in itself 'a distinct conception of that ideal.'⁶⁰ Finally, however, and most problematically, Waldron's advocacy of majority decision in relation to second order disagreement about procedures violates the very basis of his criteria for a legitimate decision-making procedure. This is due to the fact that in advocating the use of majority rule to resolve disagreement about whether majority rule is legitimate, Waldron automatically disadvantages or excludes those who disagree that majority rule is the fairest procedure to resolve this disagreement. If the core of legitimacy for Waldron is to provide reasons to hypothetical citizens such as Cn as to why a body gets to make a decision and why their opinion was not given more weight,⁶¹ then his response fails to give hypothetical citizens such as Cn reasons to accept the use of majority rule in respect of this second order disagreement about procedures. This is because a citizen who disagrees with majority rule as a method of resolving this disagreement has had no say in the use of majority rule to decide this second order disagreement nor been given reasons as to why her preference for, say, judicial resolution was not given more weight in the decision (or, in fact, not given any weight at all).⁶² The result is that Waldron's attempt to pragmatically resolve this disagreement does violence to the very foundations of this defence of institutional political constitutionalism, making his argument ultimately *self-defeating*.⁶³

⁵⁹ Kavanagh (2003), 469.

⁶⁰ Eisgruber (2002), 37.

⁶¹ See above, part 2.

⁶² One, potential, defence of Waldron's position is that in his hypothetical situation legislative supremacy is what we are 'stuck with' (LD, 301) and that it is pragmatic to continue with what we have. However this only works if the system is one that actually practices legislative supremacy. Given that Waldron claims to be putting forward a general theory, applicable to constitutional democracies tout court (LD, 4-8), if we happen to be 'stuck with' a procedure which practices judicial supremacy, even in relation to this second order question, then this argument fails, at least from the viewpoint of endorsing a path to legislative supremacy.

⁶³ Christiano (2000), 250. In a more recent defence of institutional political constitutionalism Waldron has acknowledged the critique of the self-defeating nature of his argument made by Christiano. However, he responds

Bellamy's attempt to overcome the problem of infinite regress suffers a similar fate. Unlike Waldron, he accepts that in attempting to establish procedures to resolve second order disagreement about institutional design, that any procedure adopted, without justification, will appear arbitrary to those who hold alternative views on the legitimacy of institutional design.⁶⁴ Furthermore, given his commitment to disagreement all the way down, stopping the regress in some sort of consensus about the rules or rights necessary even for legislative supremacy, is not available to him. As such, Bellamy resigns himself to the fact that:⁶⁵

'We simply have to grasp this procedural nettle and start somewhere – be that the 'already existing' political system, or – in the case of new regimes emerging from war or revolution – with whatever arrangements can be cobbled together to get the process of designing a regime off to a start.'

In so doing, Bellamy seems to be more genuinely pragmatic than Waldron on this point as he seems to accept that whatever can be 'cobbled together' may not conform to his ideal of legislative supremacy. As such, he is more genuinely sensitive to problems of disagreement about procedures than Waldron and accepts that this is something which must be constantly revisited. Once something has got off the ground, however, Bellamy warns against constitutionalizing these initial procedures as there will be disagreements about the procedures. The procedures must, therefore, be left open because we are constantly 'building the ship at sea'.⁶⁶

However, Bellamy's solution to the problem of infinite regress, while arguably taking more seriously disagreement about procedures for deciding the most legitimate institutional design, is also problematic. Firstly, in acknowledging that we are building the constitutional ship at sea, his defence of

that Christiano 'makes no attempt to show that this is a vicious regress'. (2006: 1371). However, once it is shown that the regress is infinite, the fact that it is vicious or not is immaterial; either way it is unworkable for the purposes of the debates on the legitimacy of legislative supremacy. To not classify it further as a particular type of infinite regress is irrelevant to the problem that the infinite regress poses for his defence of legislative supremacy.

⁶⁴ *PC*, 173.

⁶⁵ *PC*, 174.

⁶⁶ *PC*, 174.

legislative supremacy only works if the 'ship' one finds oneself on is one that already to an extent conforms to Bellamy's preference for legislative supremacy. In such a case, the path to legislative supremacy is a relatively smooth, if not necessarily automatic one. However, if the 'ship' is one which practices some version of judicial supremacy in the resolution of this issue, and the resultant design is one which conforms with judicial supremacy, then to change or transform it to Bellamy's requirements, that is to amend the system from judicial supremacy to legislative supremacy, runs the risk of arbitrariness. Such a move would therefore violate the foundation of his conception of the legitimacy of legislative supremacy through a violation of republican freedom. Moreover, there is no guarantee that the constant revision of procedures will result in legislative supremacy. We can expect such a proposal to be highly unstable. If procedures are always up for grabs, then it becomes impossible to guarantee that legislative supremacy will actually result from such disagreement⁶⁷, and even if it does, it may not last very long. More problematically, however, notwithstanding Bellamy's sensitivity to disagreement about institutional design, he, like Waldron, implicitly privileges legislative majority voting in the resolution of this second order disagreement, arguing that democracy can be 'self-constituting', and that it 'retains an authority and legitimacy that is independent from the right or wrongness of the policies it is employed to decide – including those about democracy itself'.⁶⁸ However, as with Waldron's position, in the circumstances of politics we must expect people to reasonably disagree on whether, in fact, democracy retains an independent authority and legitimacy. Thus, Bellamy's proposed solution to the infinite regress makes his defence of institutional political constitutionalism self-defeating in two ways; either because, it requires remaining agnostic to the very question at issue, the legitimacy of institutional legal or political constitutionalism, given that the process would be highly unstable and could either oscillate frequently between judicial and legislative supremacy or settle into judicial supremacy, or because it entails a form of domination in arbitrarily insists upon change where the process of the resolution of the disagreement regarding institutions produces the 'wrong answer'.

⁶⁷ See Christiano (2000) on this point.

⁶⁸ Bellamy (2007), 141.

In the circumstances of politics we would expect citizens to disagree as much about procedures as substantive values. In the light of such disagreement, including on particular procedures and their legitimacy, the process-based arguments advanced by Bellamy and Waldron do not, as claimed, weigh unilaterally in favour of legislative supremacy but *are themselves inconclusive*. This is because in the circumstances of politics we would expect some citizens to reject Waldron's and Bellamy's arguments in favour of legislative supremacy and so there is no 'trump' argument which can authoritatively settle this disagreement in a non question-begging way.

If the question of procedures in providing a legitimate response to the circumstances of politics are contingent or inconclusive due to the disagreement which would affect this very question, then procedures cannot do the work that Waldron and Bellamy attribute to them in legitimizing majority decision-making in the circumstances of politics. Procedural questions of institutional design such as the legitimacy of legislative or judicial supremacy are relatively⁶⁹ *irrelevant* from the viewpoint of political value. There is thus a gap in questions of substantive value and institutional design which is revealed by the self-defeating nature of their arguments.⁷⁰

⁶⁹ I say relatively because we are, of course, working within certain boundaries of a reasonably-efficient and reasonably well-ordered constitutional democracy. This argument does not apply to dictatorships or other non-democratic tyrannical regimes. This is within the parameters of the debate on political constitutionalism. See further below.

⁷⁰ This gap has been identified by other writers on the topic such as Rawls and Michelman. Rawls was agnostic to the question of institutional design, at least in terms of judicial or legislature securing of the values of overlapping consensus, in his defence of political liberalism. He argued that '[p]olitical liberalism as such, it should be stressed, does not assert or deny any of the [claims of legislative or judicial supremacy] and so we need not discuss them.' (Rawls (1996), 235) All that matters, Rawls argues, is that whichever choice is made, or practice pursued, that public reason feature in such choice or practice. Similarly, Michelman, considering the relationship between political liberalism and political legitimacy, also illustrates the gap between substantive value and institutional design. (F. Michelman, 'Ida's Way: Constructing the Respect-Worthy Governmental System' (2003) 72 *Fordham Law Review* 345.) He adopts a similar device to Waldron in assessing the legitimacy of political institutions by imaging a hypothetical citizen, Ida, and how she might appraise the legitimacy of, in this case, the US constitution. (see further below). However, notwithstanding his linking of legitimacy to political liberalism, he concludes that the question of institutional design is inconclusive. For Ida, and therefore vicariously Michelman, the practice of judicial or legislative supremacy 'neither defeats appraisal nor points toward a negative appraisal' of the legitimacy of the system. (361) One can easily conceive of a respect worthy governing totality which practices institutional political constitutionalism as institutional legal constitutionalism. (361)

Furthermore, if we disagree as much about procedures as we do about outcomes, then it appears that, in fact, outcomes matter more than procedures. If we really believe in, for example, securing the optimal protection of fundamental rights, or securing the welfare of the citizenry then, it doesn't matter whether it's done by courts or legislatures as long as it's done.⁷¹ We should therefore ignore procedures and 'pass to the interesting topic [of substantive disagreement] straight away'⁷², or simply 'take a stand on the issue of substance and be done with it.'⁷³ If *this* is the case, then Waldron or Bellamy's argument for legislative supremacy is, in effect, a 'non-starter'⁷⁴ as it is based almost entirely on the superior *procedural* legitimacy of legislatures vis-à-vis courts.

4. Authority and Disagreement

The root of the problem with Waldron and Bellamy's defences of legislative supremacy outlined in the previous section lie in their common point of departure, the circumstances of politics. As will be recalled, the circumstances of politics relates to the necessity of decision-making by a group as a whole, notwithstanding substantive good faith disagreement surrounding all aspects of the decision with the caveat that the disagreement is not of such an intensity that it is better to go it alone.⁷⁵ What the circumstances of politics requires, then, is a theory of authority which makes up the 'common framework, decision or course of action'⁷⁶. This is what Waldron and Bellamy proceed to devise in terms of legislative supremacy. However the problems with their theories outlined above in terms of disagreement about procedures lie in the fact that their responses to the circumstances of politics are inadequate *as theories of authority*.

⁷¹ Raz, (1998), 45-6.

⁷² PC, 173.

⁷³ 'Core case', 1371.

⁷⁴ PC, 172.

⁷⁵ Christiano (2000), 518.

⁷⁶ LD, 102.

Perhaps the most important criteria of a theory of authority is that the act of the authority must not replicate the disagreement which created the necessity for the authority in the first place. Authorities, if they are to discharge their function as authorities must provide 'second order exclusionary reasons'⁷⁷ for action, which are independent of the merits of the first order reasons about which we reasonably disagree in the circumstances of politics.⁷⁸ As such, the directives of the authority must be preemptive. In establishing a framework, decision or course of action, the authority must do so independently of the individual merits of the reasons advanced by opposing sides in the disagreement. Given that the decisions of an authority are independent of their substantive merit, its directives are necessarily 'arbitrary'⁷⁹ from the viewpoint of the substantive merits of the decision itself.⁸⁰

A further dimension of authority is that the authority provides some sort of benefit to those who live under the authority. Raz's service conception of authority is a contemporary example of this second dimension. For Raz, an entity is an authority if the subjects of the authority are more likely to comply with the reasons that apply to them if they follow the directives of the authority than if they attempt to comply with those reasons directly themselves.⁸¹ As such, the authority provides a benefit to its subjects in that it helps them do more efficiently and easily what they would do, or have to do, anyway.⁸² The authority is therefore 'serviceable'⁸³ in this sense. This 'serviceability' provides the basic justification of authority.

⁷⁷ J. Raz, *Practical Reason and Norms*, (Hutichison, 1975), 36.

⁷⁸ The difference between first order and second order exclusionary reasons lies in the fact that whereas a subject may act upon the preponderance of the balance of first order reasons, weighing up different reasons and acting upon what she thinks are the 'best' reasons, when second order exclusionary reasons apply, because, for example, an authority has made a decision on the matter, the subject of authority must act on whatever the authority decides regardless of what she actually thinks about the individual merit of the directive of the authority. Raz (1975) above.

⁷⁹ *LD*, 96.

⁸⁰ Which, as Waldron notes, is one of the central tenets of normative legal positivism. *LD*, Ch. 6.

⁸¹ What Raz calls the 'normal justification thesis'. Raz, 'Authority, Law and Morality' in J. Raz, *Ethics in the Public Domain*, (Clarendon: 1994), 214.

⁸² Raz stresses that this does not mean that authorities always operate in this manner but rather that an authoritative institution such as law must at least claim to be serviceable in this way. *Ibid*.

⁸³ Raz (1994) 219.

The 'reasons' in Raz's service conception, then, relate to the general benefits which accrue from societal coordination on certain issues. In the state setting the relevant 'reasons' that apply to subjects of the authority, that is the citizens of the state, constitute the general benefits of societal coordination provided by authority from which everyone in the society mutually benefits. Thus a system of tax collection and distribution, policing, welfare, public transport etc. are better achieved through an authority than through multiple individual attempts at coordination. These benefits have elsewhere been called the 'goods of the political'⁸⁴ and provide the bedrock of the justification of the authority of states or constitutions.⁸⁵

As Waldron himself points out, the second order exclusionary nature of the directives of an authority and the serviceability of the authority are connected.⁸⁶ In order for an authority to discharge its function of helping individuals comply with reasons that apply to them, it must be a credible alternative to figuring out what is to be done by the subjects themselves on a particular matter.⁸⁷ In order to provide a credible alternative to acting independently, then, the directives of an authority, such as a law, must be identifiable to the subjects of the authority without reference to the substantive merits of the directive itself. This is because if the criteria for ascertaining whether, for example, a law is authoritative, requires a subjective evaluation by citizens with regard to the merits of the law, they are essentially trying to act on the reasons that apply to them directly rather than through the authority. In such a case, the authority is no longer doing the 'work' necessary to make it an authority; that is helping subjects to comply with reasons that apply to them more fully and efficiently than if they try to act on them independently.⁸⁸

It is this arbitrariness of the merit of the directives of an authority combined with the achievement of the goods of the political that create problems for both Waldron and Bellamy in their defences of political

⁸⁴ See Michelman (2003), above.

⁸⁵ Raz (1998), above.

⁸⁶ LD, 96.

⁸⁷ LD, 96.

⁸⁸ LD, 96.

constitutionalism *qua* theories of authority. Firstly, they fail to tie a theory of authority sufficiently ‘tightly’ to democratic decision-making by majority rule (i.e. legislative supremacy).⁸⁹ Both Waldron and Bellamy’s starting point in the circumstances of the politics presuppose a theory of authority which is legitimated or ‘serviceable’ in virtue of the fact that it achieves the goods of the political, regardless of how it does it. As such, any decision-making procedure, including majority decision in a democratically elected legislature, will necessarily be *subject to* this overarching purpose of securing ‘coordination points’⁹⁰ to provide the goods of the political. If there are better, or even merely alternative means of securing ‘coordination points’ such as decision-making by courts, then these will satisfy the demands of the circumstances of politics equally well. As such the ‘coordination points are doing all the work [given that] the method of decision making is not inherently relevant to the authority of the agent that selects among these.’⁹¹ Significantly, this fact makes a particular decision-making procedure such as majority decision in a legislature a *contingent* feature of authority as it will only be authoritative to the extent to which it achieves the goods of the political, that is, that it effectively selects coordination points.

Secondly, and perhaps more problematically, democratic majority decision fails as a theory of authority with reference to disagreement about procedures more specifically. As noted, an authority must make a decision without replicating the disagreement on the substance of the issue upon which it is called upon to act. Therefore, faced with disagreement about whether majority-decision in a legislature is the fairest way to decide, an integral part of the circumstances of politics, we cannot rely on majority –decision in a legislature as a criteria for authority as this simply replicates the disagreement. In Razian terms, such an account of authority fails to help us to better comply with the reasons which apply to us in this case – devising a fair and just decision making procedure– as the criteria provided does not offer second order exclusionary reasons but rather reintroduces first order reasons. As such, Waldron and Bellamy’s solution

⁸⁹ See Christiano (2000) 528. Whereas the focus in illustrating this critique applies primarily to Waldron’s account, it applies *mutatis mutandis* to Bellamy’s account.

⁹⁰ Christiano (2000), 528.

⁹¹ *Ibid.*

essentially means that individuals faced with the circumstances of politics on this question end up having to act independently on the reasons which apply to them and continue to work out for themselves what the fairest decision-making procedure is. The authority of majority decision and legislative supremacy fails to be 'serviceable' and therefore violates the most fundamental tenet of the concept of authority, that decisions are made independently of the substantive merits of the different viewpoints held in the circumstances of politics.

What institutional political constitutionalism needs, then, in attempting to advocate legislative supremacy as the most legitimate form of decision-making in the circumstances politics, not least in the contemporary context of increased juridification, is an account of authority which entails legislative supremacy underpinned by moral reasons which do not replicate the disagreement on this point; that is reasons which do not relate to the *per se* legitimacy of majority-decision in a legislature on grounds of equality or democracy. Such an authoritative legislature must, furthermore, achieve the goods of the political as the basic criteria for any 'servicable' conception of authority. Such an account of the authority of majority decision in a legislature can be created by combining Waldron and Bellamy's defence of institutional political constitutionalism with a conception of authority which has been called the 'minimal theory of legitimacy'.⁹²

5. The Minimal Theory of Legitimacy

The 'minimal theory legitimacy'⁹³ departs from the premise that where an authority is a matter of 'social fact', that is where it *in practice* reasonably successfully achieves the 'goods of the political', then it is 'self-legitimizing'.⁹⁴ Factual authorities serve to 'concretize'⁹⁵ moral principles by 'giving

⁹² RH Fallon Jr, 'Legitimacy and the Constitution' (2004) 118 Harvard Law Review 1787.

⁹³ The phrase is Fallon's, (2004) however it applies to a number of different writers who have put forward similar ideas and ways about thinking about operational constitutions. See Michelman (2003) and J. Raz, 'On the Authority and Interpretation of Constitutions: Some Preliminaries' in L. Alexander (ed.), *Constitutionalism: Philosophical Perspectives*, (CUP, 1998). (hereinafter *AIC*)

⁹⁴ *AIC*, 174.

⁹⁵ *AIC*, 172.

them the concrete content they must have in order for people to be able to follow them.⁹⁶ As such, moral considerations ‘underdetermine’⁹⁷ the effective achievement of moral principles through securing the goods of the political. Political values such as democracy, equality, liberty or the protection of human rights rely on the securing of the goods of the political in order to be given expression, and in this way ‘factual’ authorities have a legitimacy independent of these substantive values.

Furthermore, in its focus on the achievement of the goods of the political as a prerequisite for ‘concretizing’ moral principles, the minimal theory encourages us to look at an authority such as state or constitution in the round as a ‘government totality’⁹⁸, rather than looking at individual provisions, practices or laws applied by the authority. Thus, in assessing the legitimacy of an authority we must look at the ‘entire aggregate of concrete political and legal institutions, practices, laws, and legal interpretations currently in force or occurrent’⁹⁹ within that country. Under the minimal theory, such an authority does not have to secure the goods of the political perfectly or, more importantly, perfectly justly, provided that it does so reasonably well and in a reasonably fair and just way. As such the minimal theory takes jurisdictions as it finds them and examines the ways in which they can enjoy a baseline or minimum amount of legitimacy through securing the goods of the political. This moral thrust of the minimal theory of legitimacy has been captured by the metaphor of a ‘leaky boat’; where it is better to be at sea in a leaky boat than have no boat at all.¹⁰⁰

The securing of the goods of the political by an authority according to the criteria of the minimal theory, then creates strong ‘moral motivation’¹⁰¹ on behalf of citizens to support the practices of an existing authority as well as providing moral justification ‘for the mobilization of social pressure and

⁹⁶ *Ibid.*

⁹⁷ *AIC*, 172.

⁹⁸ Michelman (2003), 347.

⁹⁹ Michelman (2003), 347.

¹⁰⁰ D. Copp, ‘The Idea of a Legitimate State’ (1999) 28(1) *Philosophy and Public Affairs*, 44.

¹⁰¹ Michelman (2003), 357.

public force as required to ensure compliance¹⁰² with the directives of an authority. As such, ‘governments are morally justified in demanding everyone’s compliance with all the laws that the judges in that country treat as validly in force, regardless of the moral and other merits and demerits of any given law.’¹⁰³ Submission to authority on this view, therefore becomes a ‘moral duty’¹⁰⁴ for individuals. This is the case notwithstanding the fact that it may not do so perfectly or to the perfect satisfaction of all of the subjects of the authority. This latter point is significant in that it explicitly presupposes the idea that citizens under an authority to which the minimal theory applies, will disagree about all aspects of the circumstances of politics, about the question of the right, the good and, significantly, the fairness and legitimacy of the decision-making procedures actually practiced under the current constitutional arrangement. As such, the minimal theory is capable of accommodating the dissent which we would expect to arise in the circumstances of politics around questions of procedures in a way which Waldron’s and Bellamy’s do not.

The minimal theory is particularly relevant in contexts of political debates surrounding constitutional change. The legitimacy enjoyed by an authority which reasonably effectively secures the goods of the political, creates a strong moral ‘*presumption in favour*’¹⁰⁵ of the authority over proposals for change. As a proven way of successfully achieving the goods of the political and concretizing moral principles, an existing authority therefore holds significant moral weight. Constitutional change could potentially jeopardize the morality of the existing authority; that is fail to achieve the goods of the political or fail to concretize moral principles. As such, the putative morality of a hypothetical alternative forming the basis of proposals for change is of the same nature as abstract moral principles in need of concretization. They do not enjoy the same weight as the ‘social fact’ of the achievement of the goods of the political and this creates a strong presumption in favour of continuity over change.

¹⁰² *Ibid.*

¹⁰³ Michelman, (2003) 346.

¹⁰⁴ Fallon (2005), 1798.

¹⁰⁵ Copp (1999), 43, *Emphasis Added*, Raz AIC, 175.

The premises supporting minimal theories are 'sparse and uninspiring'¹⁰⁶. However, as a minimal theory, it is also not absolute. Its premises are, in principle, defeasible. Thus, there are 'boundaries set by moral principles'¹⁰⁷ which determine the limits of the authority and self-legitimacy of actual constitutions or governmental structures. In this regard, then, minimal theories merely 'define a threshold above which legal regimes are sufficiently just to deserve the support of those who are subject to them in the absence of better, realistically attainable alternatives'.¹⁰⁸ As such, the minimal theory merely furnishes defeasible 'pro tanto'¹⁰⁹ reasons for the legitimacy of an existing authority. There is, the option, then, in minimal theories to 'mutiny'¹¹⁰ should the captain of the ship be incompetent or unjust.

Thus, an important aspect of the minimal theory is the specification of the point at which an actual authority such as a constitution transgresses the threshold conditions such that it loses its legitimacy and individuals are no longer under a moral obligation to obey its commands. This is a complex issue. Perhaps one easy, if abstract, case of when the reasons for submitting to authority are defeated is that envisaged by Copp; that is where societal needs 'are so poorly served by [an authority] that either the society would do better if people viewed themselves as under no moral duty at all to obey the law.'¹¹¹ That is where the goods of the political are so poorly secured by an authority, the moral obligation to obey dissipates. However, beyond this it is difficult to specify the exact point at which minimal theories are dislodged by countervailing moral considerations.

Some minimal theories of legitimacy do, however, suggest that the threshold for the loss of the legitimacy of a reasonably effective actually existing authority is quite high. Michelman, for example, argues that in considering minimal legitimacy in respect of the US constitution, and particularly its permissive attitude to slavery as exemplified by the notorious *Dred Scott v. Sandford* decision of the US

¹⁰⁶ Fallon, (2005) 1809.

¹⁰⁷ A/C, 173.

¹⁰⁸ Fallon, (2005) 1798.

¹⁰⁹ Copp, (1999) 19.

¹¹⁰ Copp, (1999) 44.

¹¹¹ Copp, (1999) 43.

Supreme Court of 1857, one view might well deem the constitutional system unworthy of respect and therefore illegitimate given that slavery was a moral evil which defeated the presumption in favour of the legitimacy of the constitution. However, in the spirit of disagreement about the legitimacy of constitutional practices, he explores an alternative conclusion on the legitimacy of the US constitution, adopted by a hypothetical citizen 'Ida', who would consider morally compromised decisions such as *Dred Scott* to be a mistake within the broader scheme of the constitution, a misreading of its provisions such that 'governing totality' was still worth preserving. Adopting the presumption in favour of the legitimacy of the constitution, she could believe that this individual decision was an aberration which was insufficient to defeat the presumption that the governing totality was still respect-worthy. For Michelman, this rather high threshold for the illegitimacy of a constitution set by Ida is justified by his version of the circumstances of politics, that is disagreement around the individual appraisals of the system itself by citizens¹¹² of whether it is worth saving or not which stems from different moral positions or 'burdens of judgment'.¹¹³ As such:¹¹⁴

'Any individual social critic's mental and discursive process of system-reconstruction undoubtedly are invaded by moral vectors, and the results arrived at by various critics undoubtedly are riven by divergence of some of the vectors arising in their several minds.'

The upshot of this is that all citizens who accept the minimal theory of legitimacy predicated on the 'goods of the political', all 'have reason to be tolerant of what they see as moral mishaps in the systemic history – specifically, by writing off those mishaps as "mistakes".¹¹⁵

In a similar way, Copp argues that the presumption in favour of the legitimacy of authority, whereas it is defeasible, is not easily dislodged. Copp bases his argument on what can be called the 'problem of innocent law' which overlaps with Michelman's approach. He argues that when a reasonably effective

¹¹² Michelman, (2003) p. 363.

¹¹³ *Ibid.*

¹¹⁴ Michelman, (2003) 363.

¹¹⁵ Michelman, (2003), 365.

state provides the 'goods of the political' and enacts a 'morally innocent' law, then following the presumption in favour of legitimacy, the state's act is justified and we have a moral obligation to obey that law.¹¹⁶ Examples of such morally innocent laws include innocent tax laws or speed limits. However, this obligation still holds, Copp argues, where the state enacts morally egregious laws alongside morally innocent ones. For example, he argues that citizens did not have a moral obligation to obey the morally bankrupt laws of Nazi Germany or the fugitive slave laws of the *ante bellum* United States.¹¹⁷ However, they *did* have an obligation, to obey the morally innocent laws of those regimes, such as 'laws against murder and rape, theft from the mails, smuggling and so on.'¹¹⁸ Furthermore, states had a right to enforce such laws.¹¹⁹ Thus, even in states which entail morally egregious practices, one is still under a moral duty to obtain a driver's licence before driving a car and buy a ticket before using public transport if the law so requires.¹²⁰ Of course the morally egregious laws may contaminate the rest of the system such that the presumption in favour of legitimacy is defeated where the pro tanto reasons fail. However his point is that even if civil disobedience can be legitimate it 'needs a serious justification because it typically involves the violation of morally innocent law.'¹²¹ The upshot of his analysis, then, is similar to Michelman's conclusion that the presumption in favour of the legitimacy of the state is not easily dislodged both because bad or wicked laws can be written off as mistakes which require action to save the system or that a vast swathe of other 'morally innocent' laws do not fail the test of respect-worthiness as they provide the goods of the political.

What Michelman and Copp show, is that the minimal legitimacy which authorities enjoy by the mere fact of being authorities, is perhaps not as easily dislodged by countervailing moral reasons as might first

¹¹⁶ Copp (1999), 20.

¹¹⁷ Copp (1999), 35.

¹¹⁸ *Ibid.*

¹¹⁹ Copp (1999), 35.

¹²⁰ *Ibid.*

¹²¹ Copp (1999), 36.

appear and that the greater the disagreement about the countervailing reasons, to be expected under the circumstances of politics, the lower their ability to dislodge the presumption.

(i) *The Minimal Theory and the Authority of Institutional Political Constitutionalism*

Both Waldron and Bellamy's defense share the same major premise¹²² as the minimal theory, the achievement of the goods of the political. Waldron, for example, argues that his justification of legislative supremacy presupposes a series of conditions similar to the requirements of the minimal theory such as democratic institutions in reasonably good working order, a set of judicial institutions in good working order charged with upholding the rule of law, a societal commitment to individual and minority rights (which includes the adoption of a bill of rights)¹²³ and good faith disagreement within this society about rights.¹²⁴ Similarly, Bellamy bases his defence in countries which have 'working democracies like the United Kingdom and the other twenty-two countries around the world where democratic practices have been firmly established for at least fifty years'¹²⁵ which also enjoy 'the longest traditions of judicial independence, rights protection and a stable system of law.'¹²⁶

Combining the minimal theory of legitimacy with Waldron and Bellamy's defences of institutional political constitutionalism, provides a robust defence against proposals for increased judicial intervention in contexts where some form of institutional political constitutionalism is already practiced. This is a not insignificant role in the light of the spread of judicial review in the past number of decades.¹²⁷ As a theory which takes its constitutional settlements as it finds them, the minimal theory necessarily includes the established relationship between legislatures and courts. Where such a settlement involves institutional political constitutionalism, then the minimal theory creates a moral presumption in favour of the legitimacy of institutional political constitutionalism. Where citizens disagree with legislative supremacy in such a

¹²² Michelman (2003), 358.

¹²³ Waldron, 'Core Case', 1365.

¹²⁴ Waldron, 'Core Case'. 1346.

¹²⁵ PC, 2.

¹²⁶ *Ibid.*

¹²⁷ See part 1 above.

settlement, or where concrete proposals are advanced for the enhanced role of the judiciary for the protection of fundamental rights,¹²⁸ then such proposals must advance compelling countervailing reasons against legislative supremacy on fundamental rights grounds which defeat the presumption in favour of the legitimacy of legislative supremacy.

Given that such proposals will be competing with the morality of the actually existing authority, they must show that they will *more effectively* achieve the goods of the political in a more legitimate way, by for example better protecting fundamental rights, than that of the status quo of institutional political constitutionalism. The required that they must prove to be *more* effective stems from the fact that they are, in the context of debates on constitutional change, non-concretized and therefore hold lesser weight than the demonstrable achievement of moral principles, including the protection of fundamental rights, through the goods of the political by the current arrangement.

Adopting Waldron's dichotomy of 'process-based' or 'outcomes-based' reasons, then, proposals for constitutional change based on enhanced judicial protection must demonstrate the enhanced legitimacy of a move to institutional legal constitutionalism based on either for these types of reasons. In this regard, both types of reasons fail based on precisely the arguments advanced by Waldron and Bellamy. It is not necessary to rehearse those arguments here suffice it to say that as both demonstrate, in terms of outcomes based reasons, courts have, historically, proven no better than legislatures in preventing human rights violations (and indeed in some cases have proven to be more egregious perpetrators) in constitutional democracies.¹²⁹ Moreover, as Waldron shows, the procedural issues which frequently inform arguments in favour of legal constitutionalism such as having your day in court and the attention to individual cases tend to be more rhetorical than actual.¹³⁰

¹²⁸ As for, example, took place in the UK in the 1980s and 90s involving groups such as Charter 88 culminating in the passing of the Human Rights Act 1998. For an overview, see H. Fenwick, *Civil Liberties and Human Rights*, (Routledge, 2007) Chapter 3. See also R. Dworkin, 'A Bill of Rights for Britain?' (1990).

¹²⁹ 'Core case', 1386-1395.

¹³⁰ Waldron, 'Core Case', 1379- 1386.

With regard to process-based reasons, institutional legal constitutionalists must similarly demonstrate its increased legitimacy. Such reasons must be 'authoritative', providing 'second order exclusionary' reasons for judicial supremacy in order to be able to justify the change. Otherwise they fail as authoritative reasons given that they would replicate the disagreement on the issue that requires a decision; a move from political to legal constitutionalism. The types of normative reasons available to legal constitutionalists in this context might include Dworkin's equality-based arguments for judicial review or Ely's arguments from procedure¹³¹ to argue for further judicial intervention where political constitutionalism is practiced. However, as Waldron and Bellamy amply illustrate, disagreement affects even these baseline democratic ideals of equality, the right to vote or the freedom of expression.¹³² Therefore, such arguments fail the criteria of authority for the same reasons that Waldron and Bellamy's defences of institutional political constitutionalism were problematic as a response to the circumstances of politics; they replicate the disagreement on the question of what such rights or values mean and what they require institutionally. As such, the arguments advanced by legal constitutionalists lack the relevant authority in the form of moral preemption to dislodge the presumption in favour of institutional political constitutionalism where practiced.

It is within the context of the minimal theory of legitimacy, applying to jurisdictions which already practice some form of institutional political constitutionalism, then, that Waldron' and Bellamy's defenses of institutional political constitutionalism can achieve their full potential, unburdened by the problems of infinite regress or procedural contingency which affected them in the abstract. The 'fact' of the achievement of the goods of the political or the concretization of moral principles establishes the authority of the constitutional settlement including the practices of institutional political constitutionalism which are independent of the substantive merits of legislative supremacy. In this way, Waldron's and

¹³¹ J. H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge MA: HUP, 1980).

¹³² 'Core Case', 1346, *PC*, Chapter 3.

Bellamy's theories can do real work, operating to resist proposals for a move to stronger judicial intervention in the interests of the protection of fundamental rights.

6. Defending the Partial Defence

This particular defence of institutional political constitutionalism through the minimal theory of legitimacy represents a departure from the conventional model of debate on political constitutionalism in that it does not attempt to provide a general defense of political constitutionalism, a 'general theory' as it were, suitable for all jurisdictions, even well-ordered constitutional democratic systems. Its application is obviously limited to jurisdictions which currently practice some form of institutional political constitutionalism. In the light of this departure from the general terms of the current debates on political constitutionalism, it is open to two potential objections from the viewpoint of the conventional debates between institutional political and legal constitutionalism; that it does not actually prevent constitutional amendment from political to legal constitutionalism or, perhaps more significantly, is not, in actual fact, a defence of political constitutionalism at all.

The first objection to the defense of institutional political constitutionalism through the minimal theory of legitimacy is that it doesn't actually prevent change to enhanced judicial intervention in the manner argued above through the lack of countervailing moral reasons for the enhanced legitimacy of judicial review. A constitutional amendment through, for example, parliamentary majority or referendum could install institutional legal constitutionalism in a jurisdiction where political constitutionalism is practiced and the minimal theory can do nothing to prevent such a change. This is true as far as it goes. However, this objection fails to appreciate the distinct contribution of the minimal theory to political debates surrounding constitutional change which involves distinguishing between what can be called ordinary reasons and 'merit reasons'¹³³ for change. Ordinary reasons for constitutional change are generally instrumental, whereas 'merit reasons' are *per se* moral reasons; that is their legitimacy stems from the intrinsic good in

¹³³ AIC, 173.

the reasons themselves rather than the ends which such reasons may achieve.¹³⁴ As Raz notes, constitutional amendments happen for many reasons such as their popularity with the electorate, increased societal cohesiveness, a rejuvenation of political culture or perceived failures in the current settlement.¹³⁵ These reasons may even be moral reasons.¹³⁶ The point is that they are qualitatively different reasons from ‘merit reasons’, that is the *per se* moral desirability of any specific feature of the constitution such as individual constitutional provisions which encapsulate substantive moral postulates such as liberty or equality. What the combination of the minimal theory and the defences of institutional political constitutionalism, provide, therefore, are *merit reasons* for resisting the change from institutional political to legal constitutionalism. These merit reasons will necessarily compete with ordinary reasons in proposals for constitutional change and may not win on the day. However, they will serve to counter and defeat competing merit reasons from institutional legal constitutionalists advocating change based on the conventional appeals to values such as liberty, equality or democracy which frequently form the basis of institutional political constitutionalism.

The second objection to the partial defence of institutional political constitutionalism is that it is too minimal; that it doesn’t really say anything particular about political constitutionalism. Rather, it is a form of general theory of authority which doesn’t really contribute to the debates about political constitutionalism specifically. As much is clear from the fact that the minimal theory can be used to defend legal constitutionalism as well as political constitutionalism where it is practiced in particular jurisdictions. As such, it is of limited significance for the core questions which animate political constitutionalism regarding the relationship between rights and democracy, courts and legislatures.

It is true that the minimal theory can be used to defend institutional legal constitutionalism as well as institutional political legal constitutionalism where practiced. However, what the critiques of political

¹³⁴ AIC, 173.

¹³⁵ AIC, 173.

¹³⁶ AIC, 173.

constitutionalism outlined previously show is that, in the final analysis, in the circumstances of politics, the question of institutional design is a *contingent* one from the perspective of political values such as liberty, equality or democracy. If we use the circumstances of politics as our starting point, emphasizing the need for authority in the face of disagreement, there can be no direct and incontrovertible link between the achievement 'goods of the political', substantive political values and a particular institutional design.¹³⁷ In order to get off the ground, therefore, a further premiss must be added for defences of political constitutionalism to hold. This additional premiss is the actual achievement of the goods of the political provided by the minimal theory. This is something that both theories of political and legal constitutionalism face. That this makes the defence political constitutionalism only a partial one is a necessary price to pay if institutional political constitutionalism is to provide an adequate response to the circumstances of politics.

7. Conclusion

This paper attempted to rescue theoretical defences of institutional political constitutionalism from the problems of infinite regress and incoherence by contextualizing these arguments within the prior conditions of the minimal theory of legitimacy, where the actual practices of institutional political constitutionalism hold normative weight independently of the legitimacy of the practice taken in isolation. Whereas it may not prevent the spread of the judicialization of politics in individual cases, the defence of institutional political constitutionalism through the minimal theory of legitimacy provides a powerful normative critique of the practice of judicial review for those jurisdictions which already practice some form of institutional political constitutionalism today. Whereas for some the partial defence of institutional political constitutionalism may be something of a pyrrhic victory, given that there is a gap between substantive value and institutional design in the context of the circumstances of politics, resulting in the self-defeating nature of stand alone theoretical defences of legislative supremacy, this is the best defences such as Waldron and Bellamy's can hope for. The minimal theory constitutes a necessary prior to

¹³⁷ See Rawls (1996) and Michelman, (2003) above.

theoretical defences of legislative supremacy and as such its conditions establish the proper place of arguments for the legitimacy of institutional political constitutionalism.